STATE OF NEW HAMPSHIRE DEPARTMENT OF STATE BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:))
Nicholas Rowe and)) ORDER TO CEASE AND) DESIST
Focus Capital Wealth Management, Inc.) ORDER TO SHOW CAUSE
Respondents) C-2011000037)

NOTICE OF ORDER

This Order commences an adjudicative proceeding under the provisions of RSA 421-B:26-a.

LEGAL AUTHORITY AND JURISDICTION

Pursuant to RSA 421-B:10, III, the secretary of state may issue an order requiring the person to whom any license has been granted to show cause why the license should not be revoked.

Pursuant to RSA 421-B:10, VI, in lieu of, or in addition to, any such order to suspend or revoke any license or application, the secretary of state may, upon hearing, assess an administrative fine of not more than \$2,500 per violation.

Pursuant to RSA 421-B:23, the Secretary of State has the authority to issue and cause to be served an order requiring any person appearing to him to be engaged or about to be engaged in any act or practice constituting a violation of RSA 421-B or any rule or order thereunder, to cease and desist from violations of RSA 421-B.

Pursuant to RSA 421-B:24, I, any person who willfully violates a cease and desist order issued pursuant to RSA 421-B:23 shall be guilty of a class B felony.

Pursuant to RSA 421-B:26, the Secretary of State has the authority to impose administrative penalties of up to \$2,500.00 for each violation of the securities laws and rules of New Hampshire.

NOTICE OF RIGHT TO REQUEST A HEARING

The above-named Respondents have the right to request a hearing on this order to cease and desist and to show cause, as well as the right to be represented by counsel. Any such request for a hearing shall be in writing, shall be signed by the Respondents, or by the duly authorized agent of the above-named Respondents, and shall be delivered either by hand or certified mail, return receipt requested, to the Bureau of Securities Regulation, Department of State, 25 Capitol Street, Concord, New Hampshire 03301.

Under the provisions of RSA 421-B:10, III, if Respondents fail to request a hearing on the show cause order within 30 calendar days of receipt of this order, Respondents shall be deemed in default, and the penalties requested will be imposed by default.

Under the provisions of RSA 421-B:23, I, if Respondents fail to request a hearing on this order within 30 calendar days of receipt of this order, Respondents shall be deemed in default, and this order shall, on the thirty-first day, become permanent.

Upon request for a hearing being received by the Bureau of Securities
Regulation, in the manner and form indicated above, a hearing shall be held not later
than ten days after such request is received by the Bureau, after which hearing, and
within 20 days of the date of the hearing, the Secretary of State, or such other person
authorized by statute, shall issue a further order vacating or modifying this order, or
making it permanent, as the circumstance require.

STATEMENT OF ALLEGATIONS

The allegations contained in the <u>Staff Petition for Relief</u> dated August 29, 2012 (a copy of which is attached hereto) are incorporated by reference hereto.

ORDER

WHEREAS, finding it necessary and appropriate and in the public interest, and for the protection of investors and consistent with the intent and purposes of the New Hampshire securities laws, and

WHEREAS, finding that the allegations in the Staff Petition, if proved true and correct, form the legal basis of the relief requested.

It is hereby ORDERED, that:

- The Respondents are hereby ordered to show cause why their licenses in the State of New Hampshire should not be revoked in accordance with RSA 421-B:10,III;
- 2. The Respondents are hereby ordered to immediately cease and desist from the above indicated acts and from in any other way violating RSA 421-B in accordance with RSA 421-B:23, I;
- 3. The Respondents shall, in accordance with RSA 421-B:10, VI and RSA 421-B:26, III, be jointly and severally liable for administrative penalties in an amount to be determined by the presiding officer;
- 4. The Respondents shall, in accordance with RSA 421-B:22, IV, pay for the cost of the investigation into this matter in an amount to be determined by the hearing officer;
- The Respondents shall, in accordance with RSA 421-B:26, V, pay rescission, restitution, or disgorgement in the amount of \$2,430,087.00;
- 6. Failure to request a hearing within 30 days of the date of receipt of this Order shall result in a default judgment being rendered, including imposition of fines and penalties upon the defaulting Respondent.

WILLIAM M. GARDNER SECRETARY OF STATE BY HIS DESIGNEE:

Dated: 8 30 12

David M. Scanlan

Deputy Secretary of State

STATE OF NEW HAMPSHIRE BUREAU OF SECURITIES REGULATION DEPARTMENT OF STATE 25 CAPITOL STREET CONCORD, NH 03301

STAFF PETITION FOR RELIEF IN THE MATTER OF:

Nicholas Rowe (CRD #2109143)
Focus Capital Wealth Management, Inc. (CRD# 117715)
C-2011000037

STATEMENT OF ALLEGATIONS

I. The staff of the State of New Hampshire, Department of State, Bureau of Securities Regulation ("Bureau") alleges the following issues of fact:

Background

- 1. Focus Capital, Inc. ("Focus Capital") was formed in January 2001. Prior to June 25, 2012, Focus Capital was a federally covered investment adviser that was required to be registered with the Securities and Exchange Commission ("SEC") and had been notice filed with the State of New Hampshire as required under RSA 421-B:7, I-b. As of June 25, 2012, Focus Capital became a state licensed investment adviser and was properly licensed with the State of New Hampshire. Focus Capital's registration with the SEC was terminated as of June 28, 2012. As an investment adviser, Focus Capital is engaged in the business of recommending, buying and selling securities for the accounts of others and rendering investment advice for compensation. Focus Capital is currently located at 166 South River Road, Suite 235, Bedford, NH. Nicholas Rowe ("Rowe") is an owner and an investment advisor representative for Focus Capital. Prior to founding Focus Capital in 2001, Rowe was employed as a broker-dealer registered representative by Jefferson Pilot Securities Corporation (now Lincoln Financial Securities Corporation) from October 1990 through January 2006. There is no record of Rowe being employed in the securities industry prior to 1990.
- 2. This matter involves various strategies related to trading in inverse and leveraged Exchange Traded Funds (ETFs) employed in the accounts of Investor #1 #11 (collectively referred to as the "NH Customers"), as outlined in this petition. ETFs are registered investment companies whose shares represent an interest in a portfolio of securities that track an underlying benchmark or index. ETFs are highly complex and are unlike traditional mutual funds since they trade throughout the day at market prices as opposed to traditional mutual

funds that are priced at the end of each trading day based on net asset value. Inverse and leveraged ETFs have different performance objectives than regular ETFs. Regular ETFs track the underlying index or benchmark whereas inverse and leveraged ETFs are designed to reach their stated performance objectives on a daily basis. Leveraged ETFs seek to return multiples of the performance of the index or benchmark they track, and inverse ETFs seek to deliver the opposite of the performance of the index or benchmark they track. Inverse ETFs are marketed as a way to profit in a declining market. Since inverse and leveraged ETFs seek to achieve their performance on a daily basis, their performance over longer periods of time, such as weeks, months or years, can have significantly different results. This negative effect can be made worse in a volatile market. Large losses can accrue through what's known as compounding. Compounding occurs when the price of inverse and leveraged ETFs drop over a number of days and the losses compound rather than track the index or benchmark. Therefore, inverse and leveraged ETFs are unsuitable for retail investors who cannot sustain the high risk of loss and who are better suited for a buy and hold strategy.

- 3. On August 18, 2009, the SEC issued a news release warning all investment advisers that leveraged and inverse ETFs reset daily, meaning that they are "designed to achieve their stated objectives on a daily basis." The SEC further explained that leveraged ETFs "seek to deliver multiples of the performance of the index or benchmark they track" and inverse ETFs "seek to deliver the opposite of the performance of the index or benchmark they track." Financial Industry Regulatory Authority ("FINRA") Regulatory Notice 09-31 explains that inverse and leveraged ETFs, "[d]ue to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective" and "inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets."
- 4. The relevant time period of this action is from January 1, 2007 to the present. During the relevant time period, Rowe and Focus Capital engaged in a trading scheme involving inverse and leveraged ETFs for the NH Customers that were unsuitable and that acted as a fraud and deceit on these customers.

Rowe and Focus Capital engaged in highly risky and unsuitable trading

5. Throughout the relevant time period, Rowe and Focus Capital employed different trading strategies that Rowe referred to as the Basil Strategy, Behavioral Strategy, and the FAAS Strategy. Each of these strategies involved investing in leveraged and inverse ETFs. Despite varying risk tolerances, Rowe employed these strategies in a virtually identical manner across the NH Customers' accounts. Many of Rowe's clients had moderate risk tolerances, which in a model investment portfolio would typically consist of approximately 60-70% invested in stocks and 30-40% invested in bonds. Rowe's strategies using leveraged ETFs resulted, in some instances, in stock market exposure of over 150%. Rowe's strategies using inverse ETFs resulted in stock market exposure of negative 100%.

Although Rowe claimed he was engaging in a legitimate and complicated trading strategy, analysis of the NH Customers' accounts revealed that Rowe was essentially placing large, short-term and very speculative directional bets on the stock market while increasing the NH Customers' risk tolerances over time.

- a. Rowe purchased inverse and leveraged ETFs for the NH Customers' and in some instances held them for more than the recommended hold period for retail accounts. In some instances, Rowe exceeded these recommended hold periods by several days, weeks, and even months. It appears obvious that Rowe completely ignored the NH Customers' individual and specific risk tolerances. At the very least, Rowe's trading in NH Customers' accounts was reckless and grossly inconsistent with Focus Capital's own recorded investment profiles and risk tolerances.
- 6. Investor #1 is a 67 year old widow from New Castle, NH. Prior to Investor #1's husband's passing, Investor #1's husband managed all the family finances while Investor #1 raised their three children. Investor #1 is unemployed and entirely dependent upon the estate left to her by her late husband. The money she invested with Focus Capital and Rowe came from this estate. Investor #1 had very little investment experience, especially with regard to complex securities such as ETFs, and relied entirely on Rowe. Investor #1 maintains that she began investing with Focus Capital and Rowe in 2004 after she was told by Rowe that he was the number one financial advisor in New Hampshire.
 - a. In April 2004, Investor #1 indicated that she has a moderate risk tolerance and a long-term investment objective. In an investment questionnaire dated February 12, 2008, Investor #1 indicated that she has a moderately aggressive risk tolerance. She also indicated that she intended to take withdrawals from her account within two years and for the next twenty-five years or more. Investor #1 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #1.
 - b. Investor #1 lost approximately seven hundred and ninety-three thousand, seven hundred and forty-one dollars (\$793,741) between January 2008 and September 2011. Much of these losses are attributable to Rowe employing his highly aggressive trading strategy with leveraged and inverse ETFs that resulted in significant losses to Investor #1 without regard to her individual suitability, investment experience, or income needs. Rowe also charged Investor #1 an increased fee for opting to take part in his inverse and leveraged ETF strategies versus his traditional account management services. Investor #1 asserts that she was told by Rowe that a portion of the fee he charged her was being paid to a person or entity associated with Wall Street for trading signals. According to Investor #1, Rowe failed to disclose to Investor #1 that this increase in fees was being assessed across her entire account, including funds invested in a money market. Investor #1 further maintains that Rowe failed to disclose how inverse and leveraged ETFs work or the risks associated with them.
- 7. Investor #2 is a 74 year old widow and retiree from Bedford, NH who began investing with

Rowe and Focus Capital in 2002. Prior to Investor #2's husband's passing, Investor #2's husband managed all the finances and made all the investment decisions. Investor #2 has very little investment experience and relied solely on Rowe's advice. In an investment questionnaire dated May 3, 2007, Investor #2 indicated that she has a moderately conservative risk tolerance. She also indicated that she intended to take withdrawals from her account within two years and for the next twenty-five years or more. She further indicated that she was "willing to withstand some fluctuations in the value of my portfolio, but I prefer to be invested in less risky investments that reduce the likelihood of large losses." Investor #2 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #2.

- a. Investor #2 lost approximately one hundred and thirty-three thousand, three hundred and seventy dollars (\$133,370) between January 2007 and May 2010. Much of these losses are attributable to Rowe employing his highly aggressive trading strategy with leveraged and inverse ETFs that resulted in significant losses to Investor #2 without regard to her individual suitability, investment experience, or income needs. Investor #2 maintains that Rowe failed to disclose to her what an ETF was and failed to disclose the risks associated with inverse and leveraged ETFs. Investor #2 maintains that Rowe also failed to disclose that fees for participation in his ETF strategies were being assessed across her entire account, including the funds invested in a money market.
- 8. Investor #3 is from Concord, NH. In August 2004, Investor #3 indicated that he has a moderate risk tolerance and a long-term investment objective. In an investment questionnaire dated July 28, 2008, Investor #3 indicated that he has a moderately aggressive risk tolerance. Investor #3 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #3. Investor #3 claims that he began investing with Focus Capital and Rowe in 2004 after he was told by Rowe that he was among the top three investment advisers in the country.
 - a. Investor #3 incurred significant losses after being solicited by Rowe to participate in his various leveraged and inverse ETF strategies. Rowe charged Investor #3 an increased fee for opting to take part in these ETF strategies versus his traditional account management services. Investor #3 asserts that he was told by Rowe that a portion of the fee Rowe charged him was being paid to a trader on Wall Street for trading signals. Investor #3 further asserts that when he questioned Rowe further about the identity of the Wall Street trader, Rowe explained that he couldn't reveal the name as he had signed a confidentiality agreement with the Wall Street trader and revealing the name could be harmful to other Focus Capital clients. Investor #3 maintains that Rowe also failed to disclose that this increase in fees for participation in his ETF strategies was being assessed across his entire account, including the funds invested in a money market. Investor #3 further maintains that Rowe failed to disclose how inverse and leveraged ETFs work or the risks associated with them.
- 9. Investor #4 is a 63 year old individual from Bow, NH and is also Investor #3's father. In an investment questionnaire dated March 17, 2006, Investor #4 indicated that he has a

moderate risk tolerance. He also indicated that he was "willing to withstand some fluctuations in the value of my portfolio, but I prefer to be invested in less risky investments that reduce the likelihood of large losses." Investor #4 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #4. Investor #5 is Investor #4's wife, who is 62 years old and also from Bow, NH. In an investment questionnaire dated March 17, 2006, Investor #5 indicated that she has moderately conservative risk tolerance. She also indicated that she felt most comfortable with "stable investments that generate consistent, but lower returns year-to-year." Investor #5 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #5. Investor #4 and Investor #5 began investing with Focus Capital and Rowe in 2006.

- a. Investor #4 and #5 incurred significant losses after being solicited by Rowe to participate in his various leveraged and inverse ETF strategies. Rowe charged Investor #4 and #5 an increased fee for opting to take part in these ETF strategies versus his traditional account management services. Investor #4 and #5 assert that they were told by Rowe that a portion of the fee he charged them was being paid to a trader on Wall Street for trading signals. Investor #4 and #5 maintain that Rowe also failed to disclose that the increase in fees for participation in his ETF strategies was being assessed across their entire account, including the funds invested in a money market. Investor #4 and #5 further maintain that Rowe failed to disclose how inverse and leveraged ETFs work or the risks associated with them.
- b. A combined analysis of Investor #3, Investor #4 and Investor #5's accounts show combined losses of approximately four hundred and fifty-six thousand, two hundred and thirty-eight dollars (\$456,238) between January 2008 and May 2011.
- 10. Investor #6 is a 60 year old widow from Amherst, NH. Investor #6's late husband, who always handled the family finances, fell ill in 2005 and was institutionalized. Later in 2005, Investor #6's husband committed suicide, leaving Investor #6 with the responsibility of handling the family finances for herself and their three children. Investor #6 had no prior investment experience and relied entirely on the advice provided by Rowe. Investor #6 maintains that she began investing with Focus Capital and Rowe in 2005 after being told by Rowe that he was one of the top three investment advisors in the country.
 - a. In an investment questionnaire dated July 18, 2005, Investor #6 indicated that she has a moderate risk tolerance. She also indicated that she intended to take withdrawals from her account within two years and for the next twenty-five years or more. She further indicated that she was "equally concerned with avoiding losses and experiencing high long-term appreciation." Investor #6 asserts that this investment questionnaire was filled out by Focus Capital and subsequently signed by Investor #6.
 - b. A margin brokerage account application dated February 9, 2006 indicates that Investor #6 has a moderate risk tolerance with no experience with options. Investor #6 asserts that this application was filled out by Focus Capital and subsequently

signed by Investor #6. An options account form dated October 27, 2008 indicates that Investor #6 has extensive experience with options. Investor #6 asserts that this application was filled out by Focus Capital and subsequently signed by Investor #6. Investor #6 further asserts that she has no experience with options and Rowe failed to disclose how they work. Investor #6 claims that she was told by Rowe that options were necessary to balance her portfolio.

- c. By early 2009, and after already experiencing losses with Rowe, Investor #6 was solicited by Rowe to participate in his various leveraged and inverse ETF strategies. Rowe charged Investor #6 an increased fee for opting to take part in these ETF strategies versus his traditional account management services. Investor #6 asserts that she was told by Rowe that a portion of the fee he charged her was being paid to a trader on Wall Street for trading signals. Investor #6 maintain that Rowe also failed to disclose that this increase in fees for participation in his ETF strategies was being assessed across their entire account, including the funds invested in a money market. Investor #6 further maintains that Rowe failed to disclose how inverse and leveraged ETFs work or the risks associated with them.
- d. Investor #6's three children, Investor #7, Investor #8, and Investor #9 were also clients of Focus Capital and Rowe. Investor #7 is Investor #6's oldest son and is 27 years old. An investment questionnaire dated July 21, 2008 indicates that Investor #7 had a moderately aggressive risk tolerance. Investor #8 is Investor #6's youngest son and is 25 years old. An investment questionnaire dated August 12, 2005 indicates that Investor #8 had a moderate risk tolerance. Investor #9 is Investor #6's only daughter and is 19 years old. An investment advisory agreement dated January 7, 2008 indicates that Investor #9 has a moderate risk tolerance. Investor # 7, Investor #8, and Investor #9 were entirely dependent on the investment advice and discretion provided to Rowe and Focus Capital. Investor #7, #8 and #9 incurred significant losses after being solicited by Rowe to participate in his various leveraged and inverse ETF strategies.
- e. A combined analysis of Investor #6, Investor #7, Investor #8, and Investor #9's accounts show combined losses of approximately nine hundred and ninety thousand, five hundred and thirteen dollars (\$990,513) between January 2008 through June 2010.
- 11. Investor #10 is from Gilmanton, NH. In an investment questionnaire dated November 3, 2008, Investor #10 indicated that he has a moderately aggressive risk tolerance. He also indicated that he intended to take withdrawals from his account within two years and for the next twenty-five years or more. Investor #11 is Investor #10's wife and also from Gilmanton, NH. In an investment questionnaire dated November 3, 2008, Investor #11 indicated that she has a moderate risk tolerance. She also indicated that she intended to take withdrawals from her account within the next two years and for the next twenty-five years or more. She further indicated that "while accepting a low level of risk, my goal is to earn slightly more than inflation." Both Investor #10 and Investor #11 assert that these investment questionnaires were filled out by Focus Capital and subsequently signed by

Investor #10 and Investor #11. Investor #10 and Investor #11 began investing with Focus Capital and Rowe in 2009.

- a. Investor #10 and Investor #11 assert that, since opening their accounts in approximately April 2009, through when they closed their accounts in October 2011, they never once met in person with Rowe to review their accounts. Investor #10 and Investor #11 have very little investment experience or knowledge. They were entirely dependent upon Rowe.
- b. Investor #10 and #11 incurred significant losses after being solicited by Rowe to participate in his various leveraged and inverse ETF strategies. Rowe charged Investor #10 and #11 an increased fee for opting to take part in these ETF strategies versus his traditional account management services. Investor #10 and #11 maintain that Rowe failed to disclose that this increase in fees for participation in his ETF strategies was being assessed across their entire account, including the funds invested in a money market. Investor #10 and #11 further maintain that Rowe failed to disclose how inverse and leveraged ETFs work or the risks associated with them. Investor #10 asserts that, in October 2011, when Investor #10 and Investor #11 announced to Rowe that they were leaving Focus Capital, Rowe attempted to get them to stay longer by promising 30% returns if they stayed. They declined and left Focus Capital.
- c. A combined analysis of Investor #10 and #11's accounts show losses of approximately fifty-six thousand, two hundred and twenty-five dollars (\$56,225) from April 2009 through November 2011.

Rowe and Focus Capital charged inappropriate and excessive fees

12. As discussed above, Rowe charged the NH Customer's an increased fee if they opted to take part in his various strategies employing inverse and leveraged ETFs versus his traditional account management services. The Bureau's investigation revealed that the increased fee charged for taking part in these various strategies was 0.50% of the entire portfolio value, even though a substantial portion of the funds were typically invested in a money market. This fee arrangement was not reported on Form ADV Part 2A as required. Furthermore, the fact that the increased fee was being charged over the entire account, including funds that were parked in a money market, was not adequately disclosed to the NH Customers.

Rowe and Focus Capital engaged in misleading and false advertising

13. Around January 2010, Rowe and Focus Capital sent a marketing card to at least twenty-seven potential clients with the following statement: "We're proud to say Focus Capital is in the top percentage in investment returns!" This marketing card was not approved by the

Focus Capital compliance officer, as required by Focus Capital's compliance policies and procedures. Neither Focus Capital nor Rowe has provided any information to support this statement.

14. Focus Capital operates a website located at the following address: http://www.focus-capital.com. Since at least August of 2010, Rowe maintains a biography of himself on this website where he claims to be an adjunct professor at "SNHU," ostensibly the local Southern New Hampshire University. Although the Bureau has information to believe that Rowe was associated in some capacity with the university, the Bureau has received confirmation from Southern New Hampshire University that they have no record of Rowe having ever been employed by the university as an adjunct faculty member or in any other capacity. The biography on Rowe's website further maintains that he has over twenty-five years of experience in wealth management. Records available to the Bureau reveal that Rowe had only been employed in the securities industry for less than twenty years when he first began claiming over twenty-five years of experience in August of 2010.

Rowe and Focus Capital failed to abide by their own policies and procedures

15. In the course of the Bureau's investigation, the Bureau learned of the following compliance issues: Suitability forms were not filled out every three years and suitability documents were filled out by Focus Capital staff at the direction of Rowe before client meetings took place and not in the presence of the client.

JURISDICTION

- 1. Pursuant to 15 USC 80b-3a, (b)(2), the Bureau is permitted to investigate and bring enforcement actions for fraud or deceit against an investment adviser or person associated with an investment adviser, regardless of whether the investment adviser is registered with the SEC or licensed by the State of New Hampshire. Despite Focus Capital becoming licensed by the State of New Hampshire on June 25, 2012, the Bureau is permitted to investigate and bring enforcement actions against Focus Capital and Rowe for fraud or deceit concerning conduct that occurred while Focus Capital was registered with the SEC.
- 2. Focus Capital and Rowe are subject to the Bureau's jurisdiction pursuant to both RSA 421-B and 15 USC 80b.

STATEMENT OF LAW

II. The Staff of the Bureau alleges the following issues of law:

- 1. Focus Capital is an investment adviser within the meaning of RSA 421-B: 2, IX and Rowe is an investment adviser representative within the meaning of RSA 421-B: 2, IX-a.
- 2. Pursuant to RSA 421-B:3, it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: to employ any device, scheme, or artifice to defraud; to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or to engage in any act, practice, or course of business which operates as a fraud or deceit upon any person. Rowe and Focus Capital are in violation of this provision for engaging in an act, practice, or course of business which operated or would operate as a fraud or deceit upon the NH Customers by engaging in a practice of investing client funds in high risk inverse and leveraged ETFs without regard to individual suitability, not adequately disclosing to clients how inverse and leveraged ETFs perform, not adequately disclosing the nature of the advisory fees to clients, not adequately disclosing the use and risks of leverage, misrepresenting Rowe's biography on the Focus Capital website, disseminating false statements claiming to be one of the top financial advisers, and by instructing staff to fill out suitability forms without customer input prior to client meetings.
- 3. Pursuant to RSA 421-B:4, I, it is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise, to employ any device, scheme, or artifice to defraud another person or to engage in any act, practice, or course of business which operates as a fraud or deceit upon the other person. Pursuant to RSA 421-B:4, V, a person who is an investment adviser or investment adviser agent is a fiduciary and has a duty to act primarily for the benefit of the person's clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and the clients and the circumstances of each case, an investment adviser or investment adviser agent shall not engage in unethical business practices which constitute violations of paragraph I, including the following:
 - (a) Recommending to a client to whom investment supervisory, management, or consulting services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser or investment adviser agent;
 - (h) Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser, investment adviser agent, or any employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such services, or omitting to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading;
 - (j) Charging a client an unreasonable advisory fee.

Rowe and Focus Capital are in violation of these provisions for engaging in a act, practice, or course of business which operates as a fraud or deceit upon the NH Customers by investing client funds in high risk inverse and leveraged ETFs without regard to the appropriate performance of the product, without regard to individual suitability, not adequately disclosing to clients how inverse and leveraged ETFs perform, not adequately disclosing the nature and extent of the advisory fees to clients, in not adequately disclosing the use and risks of leverage, misrepresenting Rowe's biography on the Focus Capital website, disseminating false statements claiming to be one of the top financial advisers, and by filling out suitability forms without input from clients prior to the client meetings.

- 4. RSA 421-B:10, III, provides that the secretary of state may issue an order requiring the persons to whom any license has been granted to show cause why the license should not be revoked. Rowe and Focus Capital are subject to this provision.
- 5. Pursuant to RSA 421-B:10, I(a), (b)(2), the secretary of state may by order suspend or revoke any license, or bar any person from licensure if he or she finds that the order is in the public interest, and that the licensee or, in the case of an investment adviser, any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling investment adviser, has willfully violated or failed to comply with any provision of this title or a predecessor law or the Investment Advisers Act of 1940. Rowe and Focus Capital are subject to this provision and their licenses should be revoked for failing to comply with RSA 421-B:3 and RSA 421-B:4.
- 6. Pursuant to RSA 421-B:10, VI, the secretary of state may, upon hearing, assess an administrative fine of not more than \$2,500 per violation, in lieu of or in addition to, an order to revoke or suspend any license or application. Rowe and Focus Capital are subject to this provision.
- 7. Pursuant to RSA 421-B:22, IV, in any investigation to determine whether any person has violated or is about to violate this title or any rule under this title, upon the secretary of state's prevailing at hearing, or the person charged with the violation being found in default, or pursuant to a consent order issued by the secretary of state, the secretary of state shall be entitled to recover the costs of the investigation, and any related proceedings, including reasonable attorney's fees, in addition to any other penalty provided under this chapter. Rowe and Focus Capital are subject to this provision.
- 8. Pursuant to RSA 421-B:23, I, whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule under this chapter, he shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of this chapter. Rowe and Focus Capital are subject to this provision.
- 9. Pursuant to RSA 421-B:26, III, any person who, either knowingly or negligently, violates any provisions of this chapter may, upon hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation or denial of any registration

- or license, or an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation. Rowe and Focus Capital are subject to this provision.
- 10. Pursuant to RSA 421-B:26, III-a. Every person who directly or indirectly controls a person liable under paragraph I, II, or III every partner, principal executive officer, or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the acts or transactions constituting the violation, either knowingly or negligently, may, upon hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal penalties imposed pursuant to RSA 421-B:24 or civil liabilities imposed pursuant to RSA 421-B:25. No person shall be liable under this paragraph who shall sustain the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist. Rowe and Focus Capital are subject to this provision.
- 11. Pursuant to RSA 421-B:26, V, after notice and hearing, the Secretary of State may enter an order of rescission, restitution, or disgorgement directed to a person who has violated RSA 421-B. Rowe and Focus Capital are subject to this provision.

RELIEF REQUESTED

- III. The staff of the Bureau of Securities Regulation requests the Director take the following action:
 - 1. Find as fact the allegations contained in section I of the Statement of Allegations of this petition.
 - 2. Make conclusions of law as stated in section II relative to the allegations contained in section I of this petition.
 - 3. Order Rowe and Focus Capital to cease and desist, in accordance with RSA 421-B:23, I.
 - 4. Order Rowe and Focus Capital to show cause why their license should not be suspended or revoked in accordance with RSA 421-B:10, III.
 - 5. Order Rowe and Focus Capital to pay an administrative fine in an amount to be determined by the hearing officer and in accordance with RSA 421-B:10, VI, and RSA 421-B:26, III.
 - 6. Order Rowe and Focus Capital to pay for the cost of the investigation of this matter in an amount to be determined by the hearing officer and in accordance with RSA 421-B:22, IV.

- 7. Order Rowe and Focus Capital to pay two million, four hundred and thirty thousand, eighty-seven dollars (\$2,430,087) in restitution to the NH Customers.
- 8. Take such other actions as necessary for the protection of New Hampshire investors and enforcement of the Act.

RIGHT TO AMEND

The Bureau's Staff reserves the right to amend this Petition for Relief and to request that the Director of Securities take additional administrative action. Nothing herein shall preclude the Staff from bringing additional enforcement action under this NH RSA 421-B or the regulations thereunder.

Respectfully submitted by:

Eric Forcier, Staff Attorney

Jeffrey Spill, Deputy Director

Date 8/24/12